

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

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|---------------------------|---|------------------------------|
| JAMES LAMONT RICHARDSON, |) | No. CV-F-07-1679 OWW |
| |) | (No. CR-F-97-5129 OWW) |
| |) | |
| Petitioner, |) | MEMORANDUM DECISION AND |
| |) | ORDER RE-OPENING TIME TO |
| vs. |) | APPEAL, DENYING PETITIONER'S |
| |) | REQUEST FOR A CERTIFICATE OF |
| |) | APPEALABILITY, AND DENYING |
| UNITED STATES OF AMERICA, |) | PETITIONER'S APPLICATION TO |
| |) | PROCEED IN FORMA PAUPERIS |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

By Memorandum Decision and Order filed on November 30, 2007, Petitioner James Lamont's Richardson's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 was denied. (Doc. 371). On May 19, 2008, Petitioner filed a notice of change of address. (Doc. 381). On July 7, 2009, Petitioner filed a motion for reconsideration pursuant to Rule 60(b), Federal Rules of Civil Procedure, of the denial of his Section 2255 motion. (Doc. 383). By Memorandum Decision and Order filed on July 9, 2009, Petitioner's motion for reconsideration was

1 denied. Petitioner was served with the July 9, 2009 Memorandum
2 Decision and Order at his new address.

3 On February 1, 2010, pursuant to the mailbox rule set forth
4 in Rule 4(c), Federal Rules of Appellate Procedure, Petitioner
5 filed a Notice of Appeal and Request for Certificate of
6 Appealability, purporting to appeal the July 9, 2009 Memorandum
7 Decision and Order.¹ Accompanying Petitioner's Notice of Appeal
8 and Request for Certificate of Appealability is a letter dated
9 January 7, 2010, from Petitioner's case manager at USP McCreary,
10 Pine Knot, Kentucky:

11 Inmate James Richardson is an inmate on my
12 case load at USP McCreary, Kentucky. This is
13 to inform you he mailed his motion to the
14 court for the US Attorney and to the US
15 District Court for the Eastern District of
16 California on September 9, 2009. The letter
17 was inadvertently mailed to USP Atwater,
18 California and returned to inmate Richardson
19 at USP McCreary, Kentucky on October 14,
20 2009. I contacted the unit officer on
21 October 20, 2009, to verify the letter being
22 returned to inmate Richardson. He stated he
23 had returned the letter on October 19, 2009.
24 I instructed inmate Richardson to go the
25 [sic] mailroom on October 22, 2009, to verify
26 why his letter had been sent to USP Atwater.
After speaking with the supervisor it is
unknown by the letter was sent to USP
Atwater. This institution went into
institutional lockdown from October 23, 2009
to October 27, 2009, and November 11, 2009,

¹The caption of Petitioner's Notice of Appeal and Request for
Certificate of Appealability sets forth the case numbers as CV-F-
02-5814 OWW and CR-F-97-5129 OWW. The civil case number is
incorrect. No. CV-F-02-5814 is the case number assigned to the
Section 2255 motion filed by Lawrence Robinson, Petitioner's co-
defendant in the underlying criminal case, who is incarcerated at
USP Atwater. Petitioner's Section 2255 motion was assigned civil
case No. CV-F-07-1679.

1 till [sic] December 4, 2009. Therefore,
2 during this time he did not have access to
3 his legal material.

4 Rule 11(b), Rules Governing Section 2255 Proceedings for the
5 United States District Courts, provides:

6 Federal Rule of Appellate Procedure 4(a)
7 governs the time to appeal an order entered
8 under these rules.

9 Rule 4(a)(1)(B), Federal Rules of Appellate Procedure, provides
10 that, when the United States is a party, a "notice of appeal may
11 be filed by any party within 60 days after the judgment or order
12 appealed from is entered." Pursuant to Rule 4(a)(4)(A), Federal
13 Rules of Appellate Procedure:

14 If a party timely files in the district court
15 any of the following motions under the
16 Federal Rules of Civil Procedure, the time to
17 file an appeal runs for all parties from the
18 entry of the order disposing of the last such
19 remaining motion:

20 ...

21 (vi) for relief under Rule 60 if
22 the motion is filed no later than
23 28 days after the judgment is
24 entered.

25 Rule 4(a)(5), Federal Rules of Appellate Procedure, provides:

26 (A) The district court may extend the time to
 file a notice of appeal if:

 (i) a party so moves no later than
 30 days after the time proscribed by this
 Rule 4(a) expires; and

 (ii) regardless of whether its
 motion is filed before or during the 30 days
 after the time prescribed by this Rule 4(a)
 expires, that party shows excusable neglect
 or good cause.

1 (B) A motion filed before the expiration of
2 the time prescribed in Rule 4(a)(1) or (3)
3 may be ex parte unless the court requires
4 otherwise. If the motion is filed after the
expiration of the prescribed time, notice
must be given to the other parties in
accordance with local rules.

5 (C) No extension under this Rule 4(a)(5) may
6 exceed 30 days after the prescribed time or
7 14 days after the date when the order
granting the motion is entered, whichever is
later.

8 Rule 4(a)(6) provides:

9 The district court may reopen the time to
10 file an appeal for a period of 14 days after
11 the date when its order to reopen is entered,
but only if all the following conditions are
satisfied:

12 (A) the court finds that the moving
13 party did not receive notice under Federal
14 Rule of Civil Procedure 77(d) of the entry of
judgment or order sought to be appealed
within 21 days after entry;

15 (B) the motion is filed within 180
16 days after the judgment or order is entered
or within 14 days after the moving party
17 receives notice under Federal Rule of Civil
Procedure 77(d) of the entry, whichever is
18 earlier; and

19 (C) the court finds that no party
would be prejudiced.

20 Here, the Clerk of the Court did not enter a separate
21 judgment regarding the denial of Petitioner's Section 2255 motion
22 or the denial of Petitioner's motion for reconsideration.
23 Consequently, pursuant to Rule 4(a)(6), the time to file a notice
24 of appeal is re-opened. Petitioner did not receive notice of
25 entry of judgment because none was entered and the United States
26 is not prejudiced. Therefore, Petitioner's Notice of Appeal as

1 to the July 9, 2009 order denying the motion for reconsideration
2 is timely.

3 Petitioner's request for a Certificate of Appealability is
4 DENIED. Petitioner has not demonstrated that reasonable jurists
5 would find the Court's assessment of his claims for relief
6 debatable or wrong. See *United States v. Zuno-Arce*, 339 F.3d
7 886, 888-89 (9th Cir. 2003) (quoting *Slack v. McDaniel*, 529 U.S.
8 473, 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000)).

9 Rule 24(a) (1), Federal Rules of Appellate Procedure,
10 provides:

11 Except as stated in Rule 24(a) (3), a party to
12 a district-court action who desires to appeal
13 in forma pauperis must file a motion in the
14 district court. The party must attach an
15 affidavit that:

16 (A) shows in the detail prescribed by Form A
17 of the Appendix of Forms the party's
18 inability to pay or to give security for fees
19 and costs;

20 (B) claims an entitlement to redress; and

21 (C) states the issues that the party intends
22 to present on appeal.

23 Rule 24(a) (4) and (a) (5) provide:

24 (a) (4) The district clerk must immediately
25 notify the parties and the court of appeals
26 when the district court does any of the
following:

(A) denies a motion to proceed on appeal in
forma pauperis;

(B) certifies that the appeal is not taken in
good faith; or

(C) finds that the party is not otherwise
entitled to proceed in forma pauperis.

1 (a) (5) A party may file a motion to proceed
2 on appeal in forma pauperis in the court of
3 appeals within 30 days after service of the
4 notice prescribed in Rule 24(a) (4) . The
5 motion must include a copy of the affidavit
6 filed in the district court and the district
7 court's statement of reasons for its action.
8 If no affidavit was filed in the district
9 court, the party must include the affidavit
10 prescribed by Rule 24(a) (1) .

11 Here, Petitioner was not required to pay a filing fee to
12 file his Section 2255 motion in the District Court. See Advisory
13 Committee Notes, Rule 3, Rules Governing Section 2255 Proceedings
14 for the United States District Courts. Petitioner's application
15 to proceed in forma pauperis establishes that Petitioner is
16 unable to pay or give security for the appellate filing fee.
17 Petitioner's application states the issues he intends to raise on
18 appeal. However, for the reasons that the certificate of
19 appealability was denied, Petitioner has not shown that the
20 appeal is taken in good faith.

21 IT IS SO ORDERED.

22 Dated: May 21, 2010

23 /s/ Oliver W. Wanger
24 UNITED STATES DISTRICT JUDGE
25
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